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ABSTRACT

This paper presents the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act (ADA) as statutory frameworks for providing educational services for students with disabilities. The paper then addresses the issue of disciplinary exclusion as provided for in each of the three laws. IDEA creates an entitlement to a free appropriate public education in the least restrictive environment (LRE) without exception, and so precludes a district from expelling any student with disabilities for alleged misconduct. A school district may change a student's educational placement to another providing a free appropriate public education meeting statutory requirements in the LRE. Any exclusion from school of more than 10 days constitutes a change of placement and may be accomplished only through the change of placement procedures set forth in IDEA and its implementing regulations. Based on Section 504, an evaluation conducted before attempting to exclude a student for more than 10 days or expel must include a determination of whether there is a connection between the behavior and the student's disability. Some students may lose some of these protections if they are using illegal drugs or abusing alcohol. References to the United States Code, the Code of Federal Regulations, and court cases are provided to support the paper's views. (JDD)

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DISCIPLINARY EXCLUSION OF STUDENTS WITH DISABILITIES UNDER FEDERAL LAW: AN OVERVIEW

by Eileen L. Ordover
April 1994

A. Statutory Framework:

1. The Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §1401 *et seq.*--formerly known as the Education for All Handicapped Children Act or "EAHCA," then the Education of the Handicapped Act or "EHA" and often referred to as P.L. 94-142--provides for federal aid to reimburse state and local education agencies for a portion of the cost of providing special education and related services to students who need it. In return, states and local school systems must comply with the detailed substantive and procedural requirements set forth in IDEA and the regulations implementing it. These include the provision of a "free appropriate public education" to all children with disabilities within their jurisdiction.

a. For purposes of IDEA, the term "children with disabilities" means "...children...with mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities...who by reason thereof need special education and related services." 20 U.S.C. §1401(a)(1). See also 34 C.F.R. §300.7(b), defining these categorical disabilities in detail.

2. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, is a civil rights statute designed to prohibit discrimination on the basis of disability in federally-funded activities.[1] The U.S. Department of Education regulations implementing §504 in the

[1] Section 504 as amended provides in relevant part that:

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preschool, elementary and secondary education context, 34 C.F.R. part 104, operate in two basic ways: (1) by generally prohibiting certain practices as discriminatory ones, and (2) by compelling school districts and other recipients to take certain affirmative steps to ensure that students with disabilities receive an appropriate public education. The latter include the requirement that public school systems "provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction...." 34 C.F.R. 104.33(a).

a. For purposes of §504, a protected "individual with a disability" is one "who i) has a physical or mental impairment which substantially limits one or more of such person's major life activities [such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working]; ii) has a record of such an impairment; or iii) is regarded as having such an impairment." 29 U.S.C. 706(8)(B); 34 C.F.R. §104.3(j)(2)(ii).

b. Virtually all children who meet IDEA eligibility criteria will fall within this definition and so be protected by §504 as well. However, the §504 definition of an "individual with a disability" is broader than the operative IDEA definition, see paragraph A(1)(a), above, and many students who do not fall within the IDEA definition of "children with disabilities" may nevertheless be "individual[s] with disabilit[ies]" protected by §504 and its implementing regulations.[2]

3. Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12101 et seq., prohibits discrimination on the basis of disability in state and local government services, including public education. See 42 U.S.C. §12132. The ADA definition of a protected individual with a disability largely parallels the §504 definition. See 42 U.S.C. §12102(2).

"No otherwise qualified individual with a disability in the United States...shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefit of, or be subject to discrimination under any program or activity receiving federal financial assistance..."

29 U.S.C. §794(a).

[2] For example, a child who has an "other health impairment," such as epilepsy or AIDS, but who does not need special education as a result is not a "child with disabilities" under IDEA. He or she would nonetheless be protected by §504. In addition, a child who does not have any of the kinds of disabilities required for IDEA eligibility may nonetheless have an impairment--or be regarded as having an impairment or have a record of an impairment--covered by §504.

B. Disciplinary Exclusion and IDEA:

1. All students who are "children with disabilities" within the meaning of IDEA have an enforceable federal entitlement to a free appropriate public education consisting of an appropriate elementary or secondary education along with necessary special education and related services in the least restrictive environment consistent with their individual needs. 20 U.S.C. §§1401(a)(18), 1412(1), 1412(5)(B), 1414(a).

a. For students with problem behavior, including aggressive or violent behavior, the school district's duty to provide FAPE includes the duty to provide the services necessary to effectively address the behavior and problems underlying it. School systems may not avoid this obligation by substituting punitive discipline for appropriate education and related services.[3]

b. IDEA creates an entitlement to a free appropriate public education in the least restrictive environment without exception, and so precludes a district from expelling any student with disabilities for alleged misconduct, regardless of whether or not the

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[3] Chris D. v. Montgomery Bd. of Ed., 753 F. Supp. 922 (M.D. Ala. 1990) (school failed to provide appropriate educational program to emotionally disturbed student where, rather than employing strategies to teach him appropriate behavior with the goal of ultimately returning him to the regular education setting, IEP merely described classroom rules and punishments and rewards for breaking them or following them; student had repeatedly been subject to disciplinary sanctions); Stuart v. Nappi, 443 F. Supp. 1235, 1241 (D. Conn. 1978) (school's "handling of the plaintiff may have contributed to her disruptive behavior"); Howard S. v. Friendswood School District, 454 F. Supp. 634, 640 (S.D. Tex. 1978)(finding that plaintiff, whom school officials sought to expel following a suicide attempt and hospitalization, "was not afforded a free, appropriate public education during the period from the time he enrolled in high school until December of 1976, [which] was...a contributing and proximate cause of his emotional difficulties and emotional disturbance"); Frederick L. v. Thomas, 408 F. Supp. 832, 835 (E.D. Penn. 1976) (recognizing that an inappropriate educational placement can cause antisocial behavior); Lamont X. v. Quisenberry, 606 F. Supp. 809, 813 n.2 (S.D. Ohio 1984)("....we cannot help but be troubled by the decision to prosecute the minor plaintiffs for the August disturbances, particularly when prosecution was combined with removal from the classroom for several months. Plaintiffs' handicap by definition includes a likelihood for behavioral disturbances, and the fact that defendants chose criminal prosecution as an appropriate response to such behavior leads us to question whether the school may have simply decided that it was time to take harsh action in such instances as a policy matter, a result which we do not perceive as wholly in keeping with the spirit and purpose of the EAHCA [now IDEA]"); Inquiry of Fields, EHLR 211:437 (OSEP 1987) (OSEP "would encourage States and localities to be alert to the possibility that repeated discipline problems may indicate that the services being provided to a particular child with a handicap should be reviewed or changed....").

conduct is a manifestation of the student's disability. Consistent with the rights and procedures set forth in IDEA (see below), a school district may change a student's educational placement to another providing a free appropriate public education meeting statutory requirements in the least restrictive environment. Response to Inquiry of New, EHLR [Education for the Handicapped Law Report] 213:258 (U.S. Department of Education/Office of Special Education Programs 9/15/89).

2. The right to a free appropriate public education includes the right to have all placement decisions made in accordance with the procedures set forth in IDEA and the regulations implementing it. Bd. of Ed. of Hendrick Hudson Central Schl. Dist. v. Rowley, 458 U.S. 176, 206-07 (1982); Honig v. Doe, 484 U.S. 305, 324-25 and n.8.

a. Mandated procedures include convening of an IEP team meeting, with full consideration of the child's needs, evaluation data, current program and placement, and placement options, consistent with 34 C.F.R. §§300.343, 300.344 and 300.533; meaningful opportunity for, and efforts by school officials to ensure, parental participation in the meeting, as per 34 C.F.R. §§300.344-.345; prior written notice of the school system's proposal to change the student's placement, as required by 34 C.F.R. §300.504, including an explanation of why the school system intends to take the proposed action, a description of the alternatives it considered along with an explanation of why those alternatives were rejected, a description of each evaluation procedure, test, record or report the school system used as a basis for its proposal, and a full explanation of all the procedural safeguards available to parents under IDEA. 34 C.F.R. §300.505. The latter include, among other things, notice and consent rights, access to records, the right to an independent educational evaluation, the right to file a complaint, due process hearing and appeal rights, the right to bring a civil action in court, the right to an attorney's fee award, and the right to have their child remain in school in his or her current placement if a complaint is filed. See 20 U.S.C. §1415; 34 C.F.R. §300.500 et seq.

b. All placement decisions must be made, with parental participation, by a team of qualified persons knowledgeable about the student's needs, the meaning of the evaluation data, the current placement and program, and placement options. 34 C.F.R. §§300.344-.345, 300.533.

3. Any exclusion from school of more than ten days constitutes a change of placement for purposes of IDEA, may be accomplished only through the change of placement procedures set forth in the statute and implementing regulations, and triggers all procedural rights set forth in 20 U.S.C. §1415. IDEA thus prohibits any unilateral exclusion of more than ten days by school officials of any child covered by the statute. Honig, supra.

a. §1415 procedural rights include the right to file a complaint contesting the proposed exclusion, the right to have a due process hearing on that complaint, the right to bring a civil action if aggrieved by the hearing result, and the student's right

to remain in his or her placement, in school, pending completion of administrative and judicial proceedings conducted pursuant to §1415. See 20 U.S.C. §1415(b)-(e).

4. There is no exception to these requirements for students deemed dangerous or disruptive or discipline problems by school officials. Honig 484 U.S. at 323.

a. Only by obtaining an injunction from a court, upon a showing that maintaining the child's placement is "substantially likely to result in injury either to himself, herself, or to others" may school officials temporarily prevent a dangerous child from attending school despite §1415. Honig, 484 U.S. at 328. The burden on school districts seeking such an injunction is "substantial." Id.

b. A student may not be excluded from his or her educational placement via a Honig injunction unless alternative provision is made for providing him or her with a free appropriate public education during the period of the injunction. See, e.g., Texas Independent School District v. Jorstad, 752 F. Supp. 231 (S.D. Tex. 1991).

5. All students who are or may be "children with disabilities" within the meaning of IDEA are fully protected against suspension and expulsion as described above, regardless of whether the school district has yet identified them as such. Hacienda LaPuente v. Honig, 976 F.2d 487 (9th Cir. 1992).

C. Disciplinary Exclusion, §504 and the ADA:

1. Absent a genuine safety emergency, imposition of any discipline for conduct related to a disability constitutes illegal discrimination. 29 U.S.C. §794; 34 C.F.R. §§104.3(j), 104.4(b), 104.33, 104.35; 42 U.S.C. §12132; 28 C.F.R. §38.130(a),(b) (implementing the ADA).[4]

2. Public school systems must provide students whose disabilities entail problem behavior with the aids, services and accommodations necessary to ensure that they receive an education that is as effective as that provided students without disabilities. 34 C.F.R. §§104.4(b)(1),(2), 104.33(b)(1); 28 C.F.R. §35.130(b)(1),(3),(7),(8).

3. Public school systems must provide students with disabilities with a free appropriate public education consisting of regular or special education and related services in the least restrictive environment consistent with their individual needs. 34 C.F.R. §§104.4(b)(1)(iv), (b)(3), 104.33(b)(1), 104.34; 28 C.F.R. §35.130(b)(1)(iv), (b)(2), (d).

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[4] See also the following U.S. Department of Eduction/Office of Civil Rights complaint decisions: School Administrative Unit #38 (NH), 19 IDELR 186; Ohio County (KY) School District, 17 EHLR 528;Compliance Review of Riverview (WA) School District, EHLR 311:103; and Nash County (NC) School District, EHLR 352:37.

4. The right to a free appropriate public education includes the right to have educational decisions made pursuant to procedures set forth in the regulations implementing §504. 34 C.F.R. §104.33(b).

a. Required procedures include a comprehensive evaluation by appropriate, qualified personnel prior to any significant change in placement, notice to parents of school district actions regarding identification, evaluation or placement, an opportunity for parents to examine relevant records, an opportunity for an impartial hearing, and a review process. 34 C.F.R. §§ 104.35, 104.36.

b. All placement decisions must be made by a group of persons knowledgeable about the child, the evaluation data and the placement options. 34 C.F.R. §104.35(c).

5. A suspension exceeding 10 days constitutes a "significant change of placement" within the meaning of 34 C.F.R. §104.35, triggering all of the aforementioned procedural requirements and rights. See, e.g., Memorandum of Oct. 28, 1988 to OCR Senior Staff from L.S. Daniels, reprinted at EHLR 307:05.

a. The school system must conduct a comprehensive evaluation meeting all of the requirements of 34 C.F.R. §104.35(b) before attempting to exclude a student for more than ten days or expel.

(i) Because §504 prohibits discrimination on the basis of disability, the evaluation must also include a determination of whether there is a connection between the behavior for which discipline is to be imposed and the student's disability.[5] Disability and conduct may be related in a variety of ways.[6]

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[5] See, e.g., Memorandum of Oct. 28, 1988 to OCR Senior Staff from L.S. Daniels, reprinted at EHLR 307:05; Memorandum of Nov. 13, 1989 to OCR Senior Staff from William Smith, 16 EHLR 491, 493.

[6] See e.g., S-1 v. Turlington, 635 F.2d 342, 346-47 (5th Cir. 1981), ("a determination that a handicapped student knew the difference between right and wrong is not tantamount to a determination that his misconduct was or was not a manifestation of his handicap" for example, "a child with low intellectual functioning who might respond to stress or respond to a threat in the only way that they feel adequate, which may be verbal aggressive behavior," or an orthopedically disabled child might behave aggressively towards other children, provoking fights, as a way of dealing with stress and feelings of physical vulnerability); School Board of Prince William County v. Malone, 762 F.2d 1210, 1216 (4th Cir. 1985) (student with specific learning disabilities acted as a go-between in drug deals for fellow students; district court had properly reasoned that "'[a] direct result of Jerry's learning disability is a loss of self image, an awareness of lack of peer approval

(ii) The evaluation must also determine whether the student has been receiving an appropriate educational program and related services, and/or whether an otherwise appropriate IEP has been implemented properly.[7]

b. The parent has a right to an impartial due process hearing to challenge the evaluation results, any resulting placement decision, or any other actions regarding the identification, evaluation or educational placement of the student. 34 C.F.R. §104.36.[8]

6. Any student who is or may be an "individual with a disability" within the meaning of §504 is fully protected against suspension and expulsion as described above, regardless of whether the school district has yet identified him or her as such. See Templeton (CA) Unified School District, 17 EHLR 859 (OCR 3/19/91); Prince George's County (MD) Public Schools, 17 EHLR 875 (OCR 3/22/91); Lumberton (MS) Public School District, 18 IDELR 33 (OCR 6/24/91).

7. Even if a student is properly suspended under §504, school officials may be required to continue providing educational services. S-1 v. Turlington, 635 F.2d 342 (5th Cir. 1981); Kaelin v. Grubbs, 682 F.2d 595 (6th Cir. 1982).

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occasioned by ridicule or teasing from his chronological age group...These emotional disturbances make him particularly susceptible to peer pressure. Under these circumstances he leaps at a chance for peer approval'"). As discussed in paragraph B(1)(b), above, any discussion regarding nexus and IDEA (rather than §504) in these pre-Honig cases is irrelevant.

[7] See cases cited infra at n.3.

[8] Some students may lose some of these protections if they are currently using illegal drugs or abusing alcohol. School officials may discipline a student with a disability for "the use or possession of illegal drugs or alcohol" to the same extent that a non-disabled student would be disciplined if the disabled student "currently is engaging in the illegal use of drugs or in the use of alcohol." 29 U.S.C. §706(8)(C)(iv). Although such students ordinarily have a right to a hearing under other laws, they do not have a right to a hearing under the §504 regulations. Id. Provided that they are also "children with disabilities" within the meaning of IDEA, however, they retain all of the IDEA rights described above.